

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DONALD JOSHUA SMITH,

Plaintiff,

v.

OMONIYI AKINTOLA,

Defendant.

No. 2:21-cv-0420-JAM-EFB P

ORDER

Plaintiff, a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983, has filed an application for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915.

Application to Proceed In Forma Pauperis

Plaintiff's application makes the showing required by 28 U.S.C. § 1915(a)(1) and (2). Accordingly, by separate order, the court directs the agency having custody of plaintiff to collect and forward the appropriate monthly payments for the filing fee as set forth in 28 U.S.C. § 1915(b)(1) and (2).

Screening Standards

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must identify cognizable claims or dismiss the complaint, or any portion

1 of the complaint, if the complaint “is frivolous, malicious, or fails to state a claim upon which
2 relief may be granted,” or “seeks monetary relief from a defendant who is immune from such
3 relief.” *Id.* § 1915A(b).

4 A pro se plaintiff, like other litigants, must satisfy the pleading requirements of Rule 8(a)
5 of the Federal Rules of Civil Procedure. Rule 8(a)(2) “requires a complaint to include a short and
6 plain statement of the claim showing that the pleader is entitled to relief, in order to give the
7 defendant fair notice of what the claim is and the grounds upon which it rests.” *Bell Atl. Corp. v.*
8 *Twombly*, 550 U.S. 544, 554, 562-563 (2007) (citing *Conley v. Gibson*, 355 U.S. 41 (1957)).
9 While the complaint must comply with the “short and plain statement” requirements of Rule 8,
10 its allegations must also include the specificity required by *Twombly* and *Ashcroft v. Iqbal*, 556
11 U.S. 662, 679 (2009).

12 To avoid dismissal for failure to state a claim a complaint must contain more than “naked
13 assertions,” “labels and conclusions” or “a formulaic recitation of the elements of a cause of
14 action.” *Twombly*, 550 U.S. at 555-557. In other words, “[t]hreadbare recitals of the elements of
15 a cause of action, supported by mere conclusory statements do not suffice.” *Iqbal*, 556 U.S. at
16 678.

17 Furthermore, a claim upon which the court can grant relief must have facial plausibility.
18 *Twombly*, 550 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads factual
19 content that allows the court to draw the reasonable inference that the defendant is liable for the
20 misconduct alleged.” *Iqbal*, 556 U.S. at 678. When considering whether a complaint states a
21 claim upon which relief can be granted, the court must accept the allegations as true, *Erickson v.*
22 *Pardus*, 551 U.S. 89 (2007), and construe the complaint in the light most favorable to the
23 plaintiff, *see Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

24 Screening Order

25 Plaintiff’s complaint (ECF No. 7) alleges the following: On March 27, 2019, a notice was
26 posted at the California Health Care Facility about possible exposure to Legionnaire’s disease
27 from the water at the prison. *Id.* at 4. Plaintiff was susceptible to exposure because of his work in
28 the kitchen scullery amid hot steam, mist, and other water vapor. *Id.* On an unspecified date in

1 March of 2019, plaintiff submitted a sick call request stating that he suffered from emphysema, a
 2 rapid heartbeat, shortness of breath, and an occasional cough and fever. *Id.* at 3-4. In response to
 3 plaintiff's request, defendant physician's assistant Omoniyi Akintola merely offered plaintiff a
 4 325-milligram tablet of acetaminophen and otherwise refused to treat or examine plaintiff. *Id.* at
 5 3-5. Plaintiff submitted a second sick call request. *Id.* at 3. The responding nurse referred
 6 plaintiff to a doctor. *Id.* The doctor ordered that plaintiff be hospitalized, where it was
 7 determined that he had suffered a mild cardiac infarction due to hypertrophic cardiomyopathy
 8 along with respiratory issues requiring medical treatment. *Id.* at 4. Plaintiff asserts an Eighth
 9 Amendment deliberate indifference to medical needs claim and state law negligence/medical
 10 malpractice claim against Akintola. *Id.* at 3.

11 Liberally construed, plaintiff's allegations are sufficient to state a potentially cognizable
 12 Eighth Amendment deliberate indifference to medical needs claim against defendant Akintola.
 13 However, plaintiff has failed to properly plead a state tort law claim of negligence. The
 14 California Torts Claims Act ("Act") requires that a party seeking to recover money damages from
 15 a public entity or its employees submit a claim to the entity *before* filing suit in court, generally
 16 no later than six months after the cause of action accrues. Cal. Gov't Code §§ 905, 911.2, 945,
 17 950.2 (emphasis added). When a plaintiff asserts a claim subject to the Act, he must affirmatively
 18 allege compliance with the claim presentation procedure, or circumstances excusing such
 19 compliance, in his complaint. *Shirk v. Vista Unified Sch. Dist.*, 42 Cal. 4th 201, 209 (2007).
 20 Plaintiff's complaint is devoid of such allegations.

21 For these reasons, plaintiff may either proceed only on the potentially cognizable Eighth
 22 Amendment claim against defendant Akintola or he may amend his complaint to attempt to cure
 23 the complaint's deficiencies. Plaintiff is not obligated to amend his complaint.

24 Leave to Amend

25 Plaintiff may file an amended complaint to attempt to cure the deficiencies noted above.
 26 Any amended complaint must identify as a defendant only persons who personally participated in
 27 a substantial way in depriving him of a federal constitutional right. *Johnson v. Duffy*, 588 F.2d
 28 740, 743 (9th Cir. 1978) (a person subjects another to the deprivation of a constitutional right if

1 he does an act, participates in another's act or omits to perform an act he is legally required to do
2 that causes the alleged deprivation). Plaintiff is not obligated to file an amended complaint.

3 Plaintiff may not change the nature of this suit by alleging new, unrelated claims in the
4 amended complaint. *George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007).

5 Any amended complaint must be written or typed so that it so that it is complete in itself
6 without reference to any earlier filed complaint. E.D. Cal. L.R. 220. This is because an amended
7 complaint supersedes any earlier filed complaint, and once an amended complaint is filed, the
8 earlier filed complaint no longer serves any function in the case. *See Forsyth v. Humana*, 114
9 F.3d 1467, 1474 (9th Cir. 1997) (the “amended complaint supersedes the original, the latter
10 being treated thereafter as non-existent.”) (quoting *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir.
11 1967)).

12 The court cautions plaintiff that failure to comply with the Federal Rules of Civil
13 Procedure, this court's Local Rules, or any court order may result in this action being dismissed.
14 *See* E.D. Cal. L.R. 110.

15 Conclusion


16 Accordingly, it is ORDERED that:

- 17 1. Plaintiff's request to proceed in forma pauperis (ECF Nos. 2, 8) is GRANTED.
- 18 2. Plaintiff shall pay the statutory filing fee of \$350. All payments shall be collected
19 in accordance with the notice to the California Department of Corrections and
20 Rehabilitation filed concurrently herewith.
- 21 3. Plaintiff's complaint alleges, for screening purposes, a potentially cognizable
22 Eighth Amendment deliberate indifference to medical needs claim against
23 defendant Akintola.
- 24 4. All other claims are dismissed with leave to amend within 30 days from the date of
25 service of this order. Plaintiff is not obligated to amend his complaint.
- 26 5. Within thirty days plaintiff shall return the notice below advising the court whether
27 he elects to proceed with the cognizable claim or file an amended complaint. If
28

1 the former option is selected and returned, the court will enter an order directing
2 service at that time.

3 6. Failure to comply with any part of this this order may result in dismissal of this
4 action.

5 Dated: April 5, 2021.

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7 EDMUND F. BRENNAN
8 UNITED STATES MAGISTRATE JUDGE
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NOTICE

In accordance with the court's Screening Order, plaintiff hereby elects to:

(1) _____ proceed only with the Eighth Amendment deliberate indifference to medical needs claim against defendant Akintola;

OR

(2) _____ delay serving any defendant and file an amended complaint.

Plaintiff

Dated: